

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Forestry and Wildlife  
Honolulu, Hawaii 96813

October 28, 2010

Chairperson and Members  
Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Land Board Members:

**SUBJECT: AUTHORIZATION FOR THE CHAIRPERSON TO NEGOTIATE AND SIGN A MEMORANDUM OF UNDERSTANDING (MOU) WITH THE COUNTY OF MAUI, FOR THE PORTION OF MAKENA-KEONEOIO ROAD THROUGH AHIHI-KINAU NATURAL AREA RESERVE (NAR), MAKAWAO, MAUI (TMK# 221004113, 221004073)**

This submittal requests the Board to authorize the Chairperson to negotiate and sign a MOU between the Board of Land and Natural Resources and the County of Maui for the portion of Makena-Keoneoio Road through Ahihi-Kinau NAR, Makawao, Maui (TMK# 221004113, 221004073), pursuant to the terms outlined below and subject to approval by the Attorney General.

**BACKGROUND:**

The Ahihi - Kinau NAR was established by the governor of the State of Hawaii in Executive Order No. 2668 in 1973, to be under the exclusive control and management of the Department of Land and Natural Resources (DLNR). Makena-Keoneoio Government Road was excluded from the NAR in Executive Order No. 2668. Neither the State of Hawaii nor County of Maui claim jurisdiction over that portion of Makena-Keoneoio Road that runs through the NAR thus critical maintenance activities have been left unattended, including repairing potholes, controlling invasive roadside weeds, and enforcing resource protection laws. In 2008, a working group was convened by the Maui Mayor's office to find resolution to this issue. The group consisted of officials from both parties, including the State's Deputy Attorney General and the County's Corporation Counsel.

The bill for an ordinance authorizing the Maui Mayor to enter into a MOU with the terms below unanimously passed through the Maui County Council Committee of Whole on September 30, 2010 and will now go to the full Maui County Council for hearing and final approval.

The County of Maui has the authority, pursuant to Chapter 12.50, Maui County Code, as amended, to provide surface maintenance of "old government roads", as the same is defined in Section 12.50.030, Maui County Code, as amended, which includes that portion of Makena-Keoneoio Road that runs through the NAR. Both DLNR the County of Maui are desirous of protecting the natural environment within the NAR, and also the safety of the public traveling

along Makena-Keoneoio Road. DLNR and the County of Maui wish to enter into a mutually-beneficial agreement to accomplish both these purposes.

In consideration of the mutual benefits that will accrue to DLNR and the County of Maui (COUNTY), a MOU has been prepared with the following terms:

**A. DLNR agrees:**

1. DLNR shall be responsible for, and shall bear all the cost of maintaining roadside vegetation along that portion of Makena- Keoneoio Road that runs through the NAR, on both sides of the road, immediately adjacent to the roadway surface.
2. DLNR shall be responsible for access to the NAR from that portion of Makena-Keoneoio Road that runs through the NAR, and shall be responsible for any control of parking along the roadway or the area immediately adjacent to the roadway surface. DLNR shall install and maintain appropriate signs as necessary to carry out this function.
3. If, in the course of its normal and regular activities in and around the NAR, DLNR discovers a condition requiring correction which it believes to be within the scope and responsibility of COUNTY under this MOU, DLNR shall notify COUNTY as soon as practicable. If the condition is within COUNTY's scope of responsibilities under this MOU, COUNTY shall take reasonable steps to remedy such condition.

**B. COUNTY agrees:**

1. COUNTY shall provide surface maintenance to that portion of Makena-Keoneoio Road that runs through the NAR, including placement or removal of surface materials on the roadway and remedial patching, as necessary; to the extent the Council of the County of Maui has authorized funds for such work in the annual budget ordinance, or any amendments thereto.
2. If, in the course of its normal and regular activities in and around the NAR, COUNTY discovers a condition requiring correction which it believes to be within the scope and responsibility of DLNR under this MOU, COUNTY shall notify DLNR as soon as practicable. If the condition is within DLNR's scope of responsibilities under this MOU, DLNR shall take reasonable steps to remedy such condition.

**C. DLNR and COUNTY jointly agree:**

1. DLNR and COUNTY will jointly pursue enforcement of any laws, rules and regulations on and around that portion of Makena-Keoneoio Road that runs through the NAR, whether civil or criminal, or both, to the extent necessary to carry out the intent of this MOU.

2. DLNR and COUNTY expressly agree and affirm that no obligations to either party pursuant to this MOU shall be construed as an admission of ownership over that portion of Makena-Keoneoio Road that runs through the NAR by either party.
3. DLNR and COUNTY agree to use best efforts to jointly pursue available monies through capital improvement projects from their respective legislative bodies, in order to assist with the services to be rendered under this MOU.
4. DLNR and COUNTY agree to abide by all general terms and conditions included as Exhibit "A" to this MOU, which is incorporated herein by reference.
5. This MOU shall be effective for five (5) years from the date of execution, provided that it may be canceled, amended or extended upon written agreement by both DLNR and COUNTY.


DISCUSSION:

Division of Forestry and Wildlife staff strongly recommend entering into a MOU as outlined above to improve the coordination of management of the portion of Makena-Keoneoio Road that runs through the NAR.


RECOMMENDATION:

That the Board authorize the Chairperson to negotiate and sign a MOU between the Board of Land and Natural Resources and the County of Maui for the portion of Makena-Keoneoio Road through Ahihi-Kinau NAR, Makawao, Maui (TMK# 221004113, 221004073), pursuant to the terms outlined above and subject to approval by the Attorney General.

Respectfully submitted,

  
for PAUL J. CONRY, Administrator  
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:

  
LAURA H. THIELEN, Chairperson  
Board of Land and Natural Resources

Attachment 1: MOU Makena Road and Ahihi-Kinau NAR

**MEMORANDUM OF UNDERSTANDING**  
Makena Road and Ahihi-Kina'u Natural Area Reserve

THIS MEMORANDUM OF UNDERSTANDING ("MOU") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2010, by and between the Department of Land and Natural Resources, State of Hawaii ("DLNR") and the County of Maui ("COUNTY"), a political subdivision of the State of Hawaii.

**WITNESSETH:**

WHEREAS, pursuant to Executive Order No. 2668, dated June 29, 1973, the Ahihi-Kinau Natural Areas Reserve ("NAR") was set aside by the governor of the State of Hawaii, to be under the exclusive control and management of DLNR; and

WHEREAS, pursuant to said Executive Order No. 2668, Makena-Keoneoio Government Road was excluded from the NAR; and

WHEREAS, neither the State of Hawaii nor COUNTY claim jurisdiction over that portion of Makena-Keoneoio Road that runs through the NAR; and

WHEREAS, COUNTY has the authority, pursuant to Chapter 12.50, Maui County Code, as amended, to provide surface maintenance of "old government roads", as the same is defined in Section 12.50.030, Maui County Code, as amended, which includes that portion of Makena-Keoneoio Road that runs through the NAR; and

WHEREAS, DLNR and COUNTY are desirous of protecting the natural environment within the NAR, and also the safety of the public traveling along Makena-Keoneoio Road; and

WHEREAS, DLNR and COUNTY wish to enter into a mutually-beneficial agreement to accomplish both these purposes;

NOW THEREFORE, in consideration of the mutual benefits that will accrue to DLNR and COUNTY, the parties agree as follows:

**A. DLNR agrees:**

1. DLNR shall be responsible for, and shall bear all the cost of maintaining roadside vegetation along that portion of Makena-Keoneoio Road that runs through the NAR, on both sides of the road, immediately adjacent to the roadway surface.

2. DLNR shall be responsible for access to the NAR from that portion of Makena-Keoneoio Road that runs through the NAR, and shall be responsible for any control of

parking along the roadway or the area immediately adjacent to the roadway surface. DLNR shall install and maintain appropriate signs as necessary to carry out this function.

3. If, in the course of its normal and regular activities in and around the NAR, DLNR discovers a condition requiring correction which it believes to be within the scope and responsibility of COUNTY under this MOU, DLNR shall notify COUNTY as soon as practicable. If the condition is within COUNTY's scope of responsibilities under this MOU, COUNTY shall take reasonable steps to remedy such condition.

**B. COUNTY agrees:**

1. COUNTY shall provide surface maintenance to that portion of Makena-Keoneoio Road that runs through the NAR, including placement or removal of surface materials on the roadway and remedial patching, as necessary, to the extent the Council of the County of Maui has authorized funds for such work in the annual budget ordinance, or any amendments thereto.

2. If, in the course of its normal and regular activities in and around the NAR, COUNTY discovers a condition requiring correction which it believes to be within the scope and responsibility of DLNR under this MOU, COUNTY shall notify DLNR as soon as practicable. If the condition is within DLNR's scope of responsibilities under this MOU, DLNR shall take reasonable steps to remedy such condition.

**C. DLNR and COUNTY jointly agree:**

1. DLNR and COUNTY will jointly pursue enforcement of any laws, rules and regulations on and around that portion of Makena-Keoneoio Road that runs through the NAR, whether civil or criminal, or both, to the extent necessary to carry out the intent of this MOU.

2. DLNR and COUNTY expressly agree and affirm that no obligations to either party pursuant to this MOU shall be construed as an admission of ownership over that portion of Makena-Keoneoio Road that runs through the NAR by either party.

3. DLNR and COUNTY agree to use best efforts to jointly pursue available monies through capital improvement projects from their respective legislative bodies, in order to assist with the services to be rendered under this MOU.

4. DLNR and COUNTY agree to abide by all general terms and conditions included as Exhibit "A" to this MOU, which is incorporated herein by reference.

5. This MOU shall be effective for five (5) years from the date of execution, provided that it may be canceled, amended or extended upon written agreement by both DLNR and COUNTY.

**D. General Terms**

DLNR and COUNTY also agree that the following provisions be made a part of this Agreement as general terms:

1. Governing Law. This Agreement shall be governed by, and construed and interpreted in accordance with the laws of the State of Hawaii, and the courts of the State of Hawaii shall have exclusive jurisdiction in any action to interpret or enforce this Agreement.
2. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of the DLNR or COUNTY, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.
3. Compliance With Laws. The DLNR and COUNTY shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws now in force or which may be in force.
4. Assignments. Neither the DLNR nor the COUNTY shall transfer to, assign, or permit any other person to perform its respective duties, obligations, or interests under this Agreement, either voluntarily or by operation of law, without the prior written approval of the other party.
5. Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this Agreement.
6. Partial Invalidity. If any term, provision, covenant or condition of this Agreement should be held to be invalid, void or unenforceable, the remainder of this Agreement shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.
7. Waiver. No party to this Agreement shall be deemed to have waived the exercise of any right or any obligation hereunder, unless such waiver is made expressly and in writing.
8. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto and supersedes all other prior or concurrent oral or written letters, agreements, or understandings.
9. No Partnership. The COUNTY and the DLNR agree that nothing in this Agreement should be construed as creating any type of partnership or joint venture arrangement or principal and agent relationship between them.

10. No Party Deemed Drafter. Each party has thoroughly reviewed and revised this Agreement and has had the advice of counsel prior to the execution hereof, and the parties agree that neither party shall be deemed to be the drafter of this Agreement.

This MOU may be executed in counterparts, each of which shall be deemed an original and said counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the day and year first above mentioned.

COUNTY:

APPROVAL RECOMMENDED:

COUNTY OF MAUI

\_\_\_\_\_  
MILTON M. ARAKAWA, A.I.C.P.  
Director of Public Works

By \_\_\_\_\_  
CHARMAINE TAVARES  
Its Mayor

APPROVED AS TO FORM AND  
LEGALITY:

DLNR:

DEPARTMENT OF LAND AND  
NATURAL RESOURCES, STATE  
OF HAWAII

\_\_\_\_\_  
DAVID A. GALAZIN  
Deputy Corporation Counsel  
County of Maui

By \_\_\_\_\_  
LAURA H. THIELEN  
Chairperson  
Board of Land and Natural  
Resources

APPROVED AS TO FORM:

\_\_\_\_\_  
LINDA L. W. CHOW  
Deputy Attorney General  
State of Hawaii

